PUBLIC MATTER – DESIGNATED FOR PUBLICATION

FILED APRIL 19, 2007

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **THOMAS L. RIORDAN**, A Member of the State Bar.	)	**02-O-11078** **OPINION ON REVIEW**

I. INTRODUCTION

Respondent, Thomas L. Riordan, requests review of a decision recommending that he be publicly reproved due to his handling of an automatic appeal from a capital sentence[1] in which he failed to perform legal services with competence, failed to comply with Supreme Court orders, and failed to timely report judicial sanctions imposed by the Supreme Court. Respondent seeks a reversal of the culpability findings. The State Bar also requests review, urging us to affirm the culpability findings and recommend respondent's actual suspension for sixty days.

Respondent was admitted to the practice of law in California on December 3, 1982, and has no prior record of discipline. His misconduct began in October 2000 and continued through February 2005. We have independently reviewed the record (Cal. Rules of Court, rule 9.12;[2] Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207) and find clear and convincing evidence to support all findings of culpability. The parties further request various modifications to factual findings and legal conclusions. To the extent we agree, the opinion so reflects; otherwise, as more fully discussed below, we adopt the factual and culpability findings

[1]See Penal Code section 1239, subdivision (b).

[2]Effective January 1, 2007, rule 951.5 has been renumbered as rule 9.12.

of the hearing department, as modified, and increase the recommendation regarding discipline to include a six-month stayed suspension.

II. DISCUSSION

A. Factual and Procedural Background

On September 12, 1991, the California Supreme Court (Court) appointed respondent as lead counsel to represent defendant Richard Turner in his automatic appeal and any related habeas corpus proceedings pending before that Court. Turner had been convicted of murder in the first degree and was sentenced to the punishment of death on about October 19, 1988, in the San Bernardino County Superior Court. Although respondent had no prior death penalty appellate experience, he applied for the appointment after Kevin Culhane, a partner with respondent's law firm, urged him to undertake such an appeal.[3] While preparing the Turner appeal, respondent worked with California Appellate Project (CAP) staff attorneys.[4] In addition to offering guidance and reviewing respondent's drafts, CAP provided respondent with material on death penalty appeals such as sample appellate briefs and relevant case law. After respondent

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[3]Only five months prior to his appointment to the Turner appeal, respondent became an associate with the now-defunct Sacramento law firm of Hansen, Boyd, Culhane, and Watson (Hansen). While with Hansen, respondent worked for several different partners, primarily researching and writing motions. Respondent left the firm in August 2002 after it was suggested that he seek other employment opportunities due to his handling of the Turner appeal. Before the Supreme Court appointed respondent to the Turner appeal, his work experience involved approximately three years as a research attorney with the Contra Costa County Public Defender's Office where he completed a small percentage of criminal appellate work, one and one-half years as an associate with a private law firm in San Francisco where he performed a small amount of civil appellate work, and approximately three years as a research attorney with the Third District Court of Appeal in Sacramento where approximately half his work involved criminal appeals.

[4]CAP is a nonprofit law firm established by the State Bar in 1983 that assists private attorneys appointed to represent indigent persons in death penalty appeals and in other criminal appeals and writs before the California Supreme Court. CAP assigns staff attorneys to cases with appointed counsel to provide guidance and assistance, as needed, in preparation of an appeal. CAP typically does not become attorney of record and was never attorney of record in the Turner appeal.

requested appointment of associate counsel to assist in the investigation and preparation of the petition for writ of habeas corpus, the Court appointed Robert M. Sanger on June 26, 1992 as associate counsel to represent defendant Turner in the same capacity as respondent. Almost eight years after respondent was appointed to the Turner appeal, the record on appeal was certified on July 6, 1999, and on that same date, the Court notified respondent and Sanger that the appellant's opening brief (AOB) was due on August 16, 1999.

The Court granted respondent's repeated requests for extensions of time to file the AOB.[5] On August 25, 2000, the Court granted respondent's seventh request for extension of time and stated that "No further extensions of time are contemplated." Despite this admonition, respondent requested an eighth extension and on October 24, 2000, the Court granted an extension to December 12, 2000, stating that "No further extensions of time will be granted." Nevertheless, instead of filing the AOB on December 12, respondent filed his ninth request for an extension of time, which the Court denied on December 20, 2000.

Despite the Court's denial, respondent did not file the AOB. Instead, on February 21, 2001, respondent filed a request to withdraw as counsel and to substitute Sanger as sole counsel for Turner. On June 13, 2001, the Court denied respondent's request without prejudice, and on June 27, 2001, ordered that the AOB be filed by July 31, 2001. The Court further warned that if the AOB was not timely filed, it would consider issuing an order directing respondent and Sanger to show cause why they should not be held in contempt or other sanction imposed for their delay in the appellate process occasioned by the eight extensions of time thus far granted. Neither respondent nor Sanger filed the AOB by the due date, and on August 15, 2001, the Court issued an order to show cause why they should not be held in contempt for the willful neglect of their

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[5]The Court granted respondent's requests for extension of time to file the AOB on August 20, 1999, October 21, 1999, December 23, 1999, February 28, 2000, April 18, 2000, July 3, 2000, August 25, 2000, and October 24, 2000.

duty to file the AOB. (*In re Thomas L. Riordan and Robert M. Sanger on Contempt*, California Supreme Court Case No. S009038.)

The hearing on the order to show cause was held on November 7, 2001. By order filed November 14, 2001, the Court relieved respondent as counsel of record in the Turner appeal.[6] On January 7, 2002, the Court filed and served on respondent an opinion finding him guilty of contempt and ordering him to pay a fine of $1,000. (*In re Riordan* (2002) 26 Cal.4th 1235.) The Court specifically found that respondent had not complied with the Court's June 27, 2001 order, that respondent was aware of and had the ability to comply with the order, and that his failure to do so was both willful and an act occurring in the immediate view and presence of the Court within the meaning of Code of Civil Procedure section 1211, thus constituting a direct contempt.[7] In a separate order also filed on January 7, 2002, the Court ordered respondent to reimburse the Court for the $42,378.36 in fees paid for preparation of the AOB.[8]

The Court forwarded a copy of the judgment of contempt to the State Bar. On January 26, 2005, the State Bar filed a three-count Notice of Disciplinary Charges (NDC) alleging that respondent failed to perform competently, failed to obey court orders, and failed to report judicial sanctions. Although respondent was required to notify the State Bar of the $1,000 fine no later than February 11, 2002, he failed to do so until three years later when he filed a response to the NDC on February 17, 2005.

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[6]Sanger was designated sole counsel on appeal, and he filed the AOB on May 7, 2002. The Turner appeal was decided in *People v. Turner* (2004) 34 Cal.4th 406.

[7]In her decision, the hearing judge mischaracterized various statements made by the justices at the OSC hearing as "findings." However, the only substantive findings of the Court are contained in its written opinion and order. (See *In re Caldwell's Estate* (1932) 216 Cal. 694, 697.)

[8]Respondent's firm paid both the fine and fee reimbursement on February 6, 2002.

After a three-day trial on August 2, 3, and 9, 2005, the hearing judge found respondent culpable on all charged counts and, upon considering the mitigating and aggravating circumstances, recommended respondent's public reproval.

B. Count One: Failing to Act Competently (Rules Prof. Conduct, rule 3-110(A))[9]

Respondent initially worked diligently on the Turner appeal but did not maintain that effort, as evidenced by the fact that he spent a mere two and one-half weeks on the Turner appeal in 2000 and performed no substantial work on it in 2001. The hearing judge found that having spent eight years on the appeal, respondent knew or should have known the matter was not simple. Rather than seek the Court's permission to withdraw earlier, respondent procrastinated, sought repeated extensions, and fostered the impression that he was working on the AOB. Ultimately, respondent was unable to complete and file the AOB, and it took the intervention of the Supreme Court to ensure that the Turner matter was fully briefed. Because respondent failed to timely file the AOB, the hearing judge concluded that respondent willfully violated rule 3-110(A).

The focus of our inquiry as to a charge of failing to act competently is whether respondent intentionally, recklessly, or repeatedly failed to apply the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary to discharge the duties arising from his employment. (Rule 3-110(A).) In order to fulfill Turner's right to effective assistance of counsel, due process principles required respondent, as appointed advocate, to submit, at a minimum, "'a brief referring to anything in the record that might arguably support the appeal.'" (*In re Andrew B.* (1995) 40 Cal.App.4th 825, 853.) Respondent contends that because his request to withdraw was denied and his draft brief was deemed constitutionally inadequate by his

[9]Unless noted otherwise, all further references to rule(s) are to the Rules of Professional Conduct.

co-counsel,[10] his failure to timely file the AOB in this case does not constitute a violation of rule 3-110(A). Respondent's argument is unpersuasive. "That an appellate attorney has demonstrated a willingness to undertake the difficult task of representing criminal defendants sentenced to suffer the death penalty does not excuse his failure timely to [file a brief or] investigate fully the potential grounds for . . . relief in any particular case." (*In re Sanders* (1999) 21 Cal.4th 697, 712 [appellate counsel appointed to represent defendant's direct appeal and habeas corpus proceedings abandoned defendant because he never investigated or filed a petition for a writ of habeas corpus].)

Although noncompliance with a time limitation does not establish per se a failure to act competently (see *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 377), we have found a violation of rule 3-110(A) when an attorney's noncompliance with a time limitation is not the result of mere negligence. (See, e.g., *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 278, 279 [attorney's failure to attend a status conference in a client's workers' compensation case constituted reckless failure to perform legal services]; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155 [attorney's failure to file a complaint within the statute of limitations, when part of a series of repeated failures, constituted a failure to perform legal services competently].) During the decade that respondent was counsel of record on the Turner appeal, he successfully moved for appointment of associate counsel, conferred with CAP staff counsel with respect to relevant issues, sufficiently familiarized himself with the record on appeal to create an extensive draft AOB, and

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[10]Respondent testified that by the end of 2000, he became aware that both his assigned CAP staff attorney, Scott Kauffman, and Sanger believed respondent's draft AOB did not develop critical issues. Kauffman testified that he did not believe respondent's draft AOB was sufficient to file and Sanger testified that he did not feel respondent's draft AOB was adequate to present to the Court. Sanger testified in the hearing below that he did utilize some of respondent's work product, and the evidence corroborates that significant portions of the AOB drafted by respondent were incorporated into the brief ultimately filed by Sanger.

obtained eight extensions of time over almost two years to file the AOB after the record on appeal was certified. In spite of these efforts on Turner's behalf, respondent was unable to finish his assigned task. Given the length of time respondent was involved in the appeal, it is simply inexplicable that he could not or did not either obtain adequate assistance or take timely steps to withdraw, particularly in a case involving the death penalty where diligent representation was of paramount importance. Under these circumstances, respondent's failure ultimately to file the AOB evidences a reckless failure to perform legal services competently. Neither the Court's refusal to permit respondent's withdrawal nor perceived inadequacies of his draft by others excused respondent's protracted delay and utter failure to file the AOB.

C. Count Two: Failure to Obey Court Orders (Bus. & Prof. Code, § 6103)[11]

The hearing judge found that respondent failed to comply with the Court's October 24, 2000 and June 27, 2001 orders requiring the AOB be filed no later than December 12, 2000 and July 31, 2001, respectively, in willful violation of section 6103. We find clear and convincing evidence to support this culpability determination, particularly since the Court filed an opinion, *ante*, finding that respondent had not complied with its June 27, 2001 order, that respondent was aware of and had the ability to comply with said order, and that respondent's failure to do so was willful, constituting a direct contempt.

Respondent argues that he should not be found culpable of willfully violating section 6103 because the State Bar failed to prove that he violated the Court's orders in bad faith. Contrary to respondent's assertion, we do not find that bad faith is a necessary element of a section 6103 violation.[12] For disciplinary purposes, bad faith must be proved if the State Bar

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[11]Unless noted otherwise, all further references to section(s) are to the Business and Professions Code.

[12]According to section 6103, "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear . . . [constitutes cause] for disbarment or suspension."

alleges that respondent's noncompliance with the Court's orders involves moral turpitude. (See *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 950-953.) Such an allegation is not at issue in this matter.

Respondent also claims he did not comply with the Court's orders because he had a good faith belief that his draft AOB was insufficient to adequately protect Turner's interests and that Sanger had assumed the task of filing the AOB. The hearing judge rejected this argument, as do we. Respondent's *belief* in the merit or lack of merit of his brief is simply irrelevant to the issue of whether he made a good faith *effort* to comply with the Supreme Court's orders. Respondent had an affirmative duty to comply with the Court's orders and he could not simply disregard them and "sit back and await contempt proceedings before complying with or explaining why he . . . cannot obey a court order." (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 404.) Moreover, in view of the Court's statements in its orders that "no further extensions of time are contemplated" and "no further extensions of time will be granted," we find that respondent's claimed belief that he had the right to ignore this clear and unequivocal language was implausible at best and disingenuous at worst. (*Maltaman v. State Bar, supra*, 43 Cal.3d at pp. 951-952.) Nevertheless, we address respondent's asserted basis for good faith as a possible factor in mitigation, *post*.

D. Count Three: Failure to Report Judicial Sanctions (§ 6068, subd. (o)(3))[13]

Respondent stipulated that he was served with the Court's opinion finding him in contempt and sanctioning him in the amount of $1,000. He also stipulated that he was to notify the State Bar about the imposed sanction no later than February 11, 2002. Since respondent did

[13]Under this section, "It is the duty of an attorney . . . .[¶] . . . [¶] . . . To report to the [State Bar], in writing, within 30 days of the time the attorney has knowledge of . . . . [¶] . . . [¶] . . . The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)."

not so notify the State Bar until February 17, 2005, the hearing judge concluded that he willfully violated section 6068, subdivision (o)(3).

On appeal, respondent admits that he did not report the judicial sanction by February 11, 2002, but justifies his failure to do so because he received a copy of the February 7, 2002, notice of the sanction sent to the State Bar by the Clerk of the Supreme Court. Respondent claims that because he had actual knowledge that the Clerk notified the State Bar of the sanction, it would have been superfluous for him to provide additional written notice. We disagree. The Clerk had a statutory duty to notify the State Bar of the order of contempt and imposition of judicial sanctions and therefore did not notify the State Bar on respondent's behalf.[14] However, respondent had an independent duty to report judicial sanctions and the time for reporting such sanctions ran from the moment he knew the sanctions were imposed, regardless of the finality of the order or pendency of any appeal. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 866-867.) Section 6068, subdivision (o)(3) offers no exception to respondent's independent reporting obligation, regardless of his actual knowledge that the Court had complied with its own separate statutory duty to notify the State Bar. (See, e.g. *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 176 [attorney's awareness that the Superior Court was notifying the State Bar of sanctions mitigated his violation of section 6068, subdivision (o)(3) but did not absolve him of culpability].) Thus, we adopt the hearing judge's culpability finding on this count.

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[14]Section 6086.7, subdivision (a) provides that "A court shall notify the State Bar of any of the following: [¶] . . . A final order of contempt imposed against an attorney that may involve grounds warranting discipline [or] . . . . [¶] . . . [¶] . . . The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)."

E. Factors in Aggravation and Mitigation

1. Aggravation

We agree with the hearing judge's determination that respondent engaged in multiple acts of wrongdoing, but we give this little weight. Respondent willfully failed to obey court orders and failed to promptly report the imposition of judicial sanctions. These acts support a finding in aggravation that respondent engaged in multiple acts of misconduct. (See *In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627 [two violations of failure to supervise resulting in trust fund violations, plus improper threat to bring criminal action constituted multiple acts of wrongdoing in aggravation]; but see *In the Matter of Blum, supra,* 3 Cal. State Bar Ct. Rptr. at p. 177 [one client matter involving misappropriation, failure to promptly pay funds at client's request and failure to inform client of right to seek independent counsel, plus failure to report sanctions in another client matter, were not viewed by this court "as strongly presenting aggravation on account of multiple acts of misconduct . . . ."]; Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(ii).)[15]

The State Bar contends that the hearing judge improperly failed to consider additional evidence of uncharged misconduct and argues that respondent lied to the Court at the OSC hearing when he told Justice Kennard that his practice had been exclusively civil since 1991 when he was appointed to the Turner appeal. It is unclear whether respondent's statement to Justice Kennard was solely limited to his practice with the Hansen firm which may have been exclusively civil, the Turner appeal notwithstanding.[16] Accordingly, on this record, we do not

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[15]All further references to standard(s) are to these provisions.

[16]During the OSC hearing, Justice Kennard stated to respondent, "you indicated that the root of the problem in this case [the Turner appeal] for your failure to come up with a brief within certain time constraints was your problem in dealing with criminal issues." Justice Kennard then asked respondent, "Do I gather, then, that currently your practice is - you have a very heavy civil practice; would that be correct to state?" Respondent stated, "You're right. It's exclusively civil. And has been since I had this - the case in 1991."

find clear and convincing evidence that respondent intended to mislead the Court or willfully committed an act involving moral turpitude, dishonesty or corruption.

The State Bar next contends that the hearing judge omitted a finding that respondent's conduct in failing to timely file the AOB significantly harmed the administration of justice. We agree. Respondent's misconduct unnecessarily delayed the appellate process by more than two years and thus harmed the administration of justice. (Std. 1.2(b)(iv); see also *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 75, 79 [attorney's misconduct which included, among other things, violation of court orders and findings of contempt, harmed the administration of justice].)

2. Mitigation

We adopt the hearing judge's finding that respondent practiced law for over 17 years with no prior record of discipline. The State Bar contends that respondent should receive no mitigative credit for his extensive period of discipline-free practice because his present misconduct is serious. We are not persuaded by the State Bar's argument. According to standard 1.2(e), "Circumstances which *shall* be considered mitigating are: [¶] (i) [the] absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious . . . ." (Italics added.) Thus, in a disciplinary proceeding where an attorney sufficiently proves the absence of a prior record of discipline over many years and where the misconduct is not deemed serious, mitigative credit must be given. Although standard 1.2(e) describes instances when consideration of certain mitigating circumstances is mandatory, it is by no means an exclusive list of every factor that may be considered in mitigation. Indeed, the Supreme Court and this court routinely have considered the absence of prior discipline in mitigation even when the misconduct was serious. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 31, 32, 36, 39 [mitigative credit given for almost twelve years of discipline-free practice despite intentional misappropriation and commingling]; *Boehme v. State Bar* (1988) 47 Cal.3d 448, 452-

453, 454-455 [twenty-two years of practice without prior discipline was important mitigating circumstance despite attorney's intentional misappropriation and lack of candor to court]; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 588-589, 591 [mitigation acknowledged for the absence of a prior record of discipline in twelve years of practice despite willful misappropriation of over $29,000]; *In the Matter of Trillo* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 59, 69 [credit given for no prior history of discipline in fourteen years of practice where attorney converted client funds and deceived clients].) Therefore, we consider respondent's practice of law for more than 17 years with no prior record of discipline to be a significant mitigating factor.

Like the hearing judge, we also find mitigating the fact that there has been no further misconduct on the part of respondent.[17] However, while the hearing judge determined that respondent had been practicing for more than four years without misconduct, we conclude that only three and one-half years elapsed from the date respondent failed to timely report judicial sanctions in February 2002 to the date trial commenced in this matter in August 2005. Although the hearing judge neither referenced standard 1.2(e)(viii) nor specifically found respondent to be rehabilitated,[18] this does not foreclose consideration of respondent's successful post-misconduct practice since the Supreme Court has found mitigation where there was no specific showing of rehabilitation other than the practice of law for a period of time without further misconduct. (*Amante v. State Bar* (1990) 50 Cal.3d 247, 256 [three years of unblemished post-misconduct

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[17]On the third day of trial during respondent's direct examination, his attorney asked him "Do you have any prior record of discipline?" Respondent answered, "No." Respondent's attorney then asked, "And do you have any subsequent discipline cases since this one has been raised?" Respondent answered, "No." Although it had the opportunity to do so, the State Bar did not rebut respondent's claim. Thus, we reject the State Bar's assertion that there is no evidence in the record that respondent did not commit further misconduct.

[18]Standard 1.2(e) states that "Circumstances which shall be considered mitigating are: [¶] . . . [¶] (viii) the passage of considerable time since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation . . . ."

practice given mitigative credit]; *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 305, 308, 316-317 [passage of approximately six years of continued practice without suffering additional charges of unethical conduct demonstrated attorney's ability to adhere to standards of professional behavior and was considered in mitigation].) Thus, we afford mitigation to respondent's three and one-half years of discipline-free, post-misconduct practice.

The hearing judge gave slightly diminished mitigation to respondent's evidence of good character, reasoning that respondent's four character witnesses, all of whom were attorneys, did not constitute a wide range of references in the legal and general communities required under standard 1.2(e)(vi).[19] Each witness reviewed the Stipulation of Undisputed Facts and the pretrial statements each party filed,[20] and uniformly attested at trial to respondent's good character and honesty. The hearing judge found that the declaration of one of the character witnesses, Ms. Pavlovich, was "particularly noteworthy" and so do we. Ms. Pavlovich testified that she had worked with respondent in the same law firm for twelve years, which included the time when he was working on the Turner AOB. She declared that "he performed his assignments in an exemplary manner" and that "she trusted him completely to timely deliver an excellent work product." She further attested that he was "one of the most honest, honorable, moral persons" she had known and "of the highest moral character." Because attorneys and judges have a "strong interest in maintaining the honest administration of justice" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319), "[t]estimony of members of the bar . . .

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[19]Standard 1.2(e) states that "Circumstances which shall be considered mitigating are: [¶] . . . [¶] (vi) an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct . . . ."

[20]We reject as unsupported by the record the State Bar's contention that respondent's character witnesses were not aware of the full extent of his misconduct. We see no shortcoming in using the parties' pretrial statements, which addressed the charges against respondent, and stipulation to apprise the character witnesses of petitioner's alleged unethical acts.

is entitled to great consideration." (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) However, in disciplinary proceedings, we have tempered the weight afforded evidence of good character offered for the purpose of mitigation when a wide range of references is absent. (See, e.g., *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 590, 594-595 [character testimony of an attorney, district sales manager, and a department store owner did not constitute a wide range of references]; *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476 [character testimony from three attorneys not a sufficiently wide range of references].) Thus, like the hearing judge, we recognize respondent's good character evidence but, due to the absence of a wide range of references, diminish its weight in mitigation accordingly.

We agree with the hearing judge that respondent's cooperation with the State Bar by entering into a factual stipulation covering background facts should be considered in mitigation. Although the stipulated facts were not difficult to prove and did not admit culpability, they were, nevertheless, extensive, relevant and assisted the State Bar's prosecution of the case. The State Bar further admitted in its pretrial statement that respondent had "cooperated in the State Bar's investigation and proceedings . . . ." Thus, we consider respondent's factual stipulation a mitigating circumstance under standard 1.2(e)(v). (See *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567 [attorney afforded mitigation for entering belated stipulations which mostly concerned easily provable facts].)

As mentioned earlier, the hearing judge properly rejected respondent's good faith claim as a defense to his culpability under section 6103. We also find his good faith claim in mitigation is unavailing. "In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held *and* reasonable. [Citations.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) To conclude otherwise would reward an attorney for his unreasonable beliefs and "for his ignorance of his ethical responsibilities." (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct.

Rptr. 420, 427.) Even if respondent honestly believed that his draft AOB was insufficient to adequately protect Turner's interests and that Sanger had assumed the task of filing the AOB, it was not reasonable for him to believe that he did not have to comply with the Court's order to timely file the AOB since respondent knew the Court had rejected his requests for additional extensions of time and to be relieved as counsel. In addition, respondent made no effort to confirm that Sanger would be able to timely file the AOB.

F. Level of Discipline

The hearing judge recommended that respondent be publicly reproved. The State Bar requests that respondent be actually suspended, while respondent seeks dismissal of all charges.[21] We have found respondent culpable of failing to perform competently, to obey court orders and to timely report judicial sanctions. Respondent's unethical conduct is aggravated because it involves multiple acts of misconduct and significantly harmed the administration of justice. Respondent's mitigation consists of a seventeen-year career with no record of discipline, three and one-half years of successful post-misconduct practice, good character, and cooperation with the State Bar.

We observe that rather than the punishment of attorneys, the purpose of attorney discipline is the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.3.) In determining the appropriate level of discipline, we afford "great weight" to the standards (*In re Silverton* (2005) 36 Cal.4th 81, 92). Nevertheless, The Supreme Court is "'not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.' [Citations.]" (*In the Matter of Van Sickle*

[21]In the alternative, respondent urges us to recommend his admonishment in the event we find him culpable of unethical conduct.

(2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) We also consider relevant decisional law. (See *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059.)

Standard 2.6 applies to respondent's misconduct and, depending on the gravity of the offense or harm, provides for disbarment or suspension when an attorney violates section 6068 or 6103.[22] A review of a variety of case law, as well as the unique facets of this case, discussed *post*, leads us to conclude that respondent's misconduct warrants discipline on the low end of the range suggested by standard 2.6, particularly since there was no client harm in this matter.[23]

In *Borre v. State Bar* (1991) 52 Cal.3d 1047 (*Borre*), an attorney who had practiced law for over 14 years without prior discipline received a two-year actual suspension after he abandoned an incarcerated client's criminal appeal. Despite obtaining two extensions of time to file the opening brief, the attorney never filed it, and the court dismissed the appeal. (*Id*. at p. 1050.) After the client filed a complaint with the State Bar, the attorney proffered an exculpatory letter which was determined to be fabricated. (*Ibid*.) In adopting a two-year actual suspension, the Supreme Court noted that "Petitioner's abandonment of his incarcerated client was itself a serious matter warranting substantial discipline [Citation]" and that "His fabrication of the . . . letter and subsequent lies . . . are particularly egregious." (*Id*. at p. 1053.)

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[22]According to this standard, "Culpability of a member of a violation of any of the following provisions of the Business and Professions Code shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline . . . [¶] (a) Sections 6067 and 6068; [¶] (b) Sections 6103 through 6105 . . . ."

[23]Since the gravamen of respondent's misconduct involves issues of competent performance, which in this instance underlie a violation of Supreme Court orders, we have reviewed cases which involve either an attorney's failure to perform in a single client matter or failure to obey court orders.

In *Harris v. State Bar* (1990) 51 Cal.3d 1082 (*Harris*), the Supreme Court imposed a 90-day actual suspension on an attorney who "did virtually *nothing* for over four years to perform the duties for which she had been retained." (*Id*. at p. 1088.) Although the attorney practiced law for ten years without misconduct and contracted typhoid six months after being retained, this did not outweigh the fact that she caused substantial prejudice to the client and showed no remorse or even an understanding that her neglect was improper. (*Ibid*.)

In *Layton v. State Bar* (1990) 50 Cal.3d 889 (*Layton*), the Supreme Court imposed a 30-day actual suspension on an attorney who, over more than a five-year period, failed to conserve the assets and obtain the distribution of an estate for which he was the attorney and executor. (*Id*. at p. 897.) Due to his neglect, the probate court removed the attorney as estate executor. (*Ibid*.) The attorney's misconduct significantly harmed a beneficiary by denying her distribution from the estate at a time when she was experiencing extreme financial need and also harmed the estate by depriving it of interest and causing it to incur tax penalties. (*Ibid*.) The attorney was also indifferent toward rectification or atonement. In mitigation, the attorney had practiced law for over 30 years without discipline and had been under considerable emotional and physical strain due to the need to care for his terminally-ill mother. (*Ibid*.)

In *Van Sloten v. State Bar* (1989) 48 Cal.3d 921 (*Van Sloten*), the Supreme Court imposed a six-month stayed suspension on an attorney who had practiced law for approximately five and one-half years before committing misconduct that spanned one year and involved a single act of failing to perform in a dissolution matter. The court found that the attorney's failure to perform was "without serious consequences to the client" but that his failure to appear before the Review Department "demonstrate[d] a lack of concern for the disciplinary process and a failure to appreciate the seriousness of the charges against him." (*Id*. at p. 933.)

In *In the Matter of Respondent Y, supra,* 3 Cal. State Bar Ct. Rptr. 862 (*Respondent Y*), we found an attorney culpable of failing to obey a court order to pay sanctions that were imposed as a result of his bad faith tactics and actions while defending an action in San Diego County

Superior Court. We also concluded that the attorney failed to timely report the sanctions to the State Bar. In adopting the hearing judge's recommendation of a private reproval, we observed that "There is little evidence before us bearing on degree of discipline." (*Id*. at p. 869.) We acknowledged the attorney's lack of prior discipline; however, we neither described the period of discipline-free practice nor application of the disciplinary standards. (*Ibid*.)

In *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459 (*Nees*), the Supreme Court adopted our recommendation of a six-month actual suspension for an attorney who abandoned the habeas corpus petition of a client incarcerated on a long prison sentence. In addition, the attorney failed to return the client's files, to refund $7,000 in advanced fees, and to cooperate with the State Bar. (*Id*. at p. 463.) The attorney's mere four years of practice without prior discipline was not mitigating. His misconduct was aggravated by the fact that it involved multiple acts and significantly harmed the client. The attorney failed to acknowledge the impropriety of his actions and failed to participate in the underlying disciplinary proceeding. (*Ibid*.) We further observed that the attorney's protracted retention of significant unearned fees "approached a practical appropriation." (*Id*. at p. 465.)

In this case, respondent's inability to timely file the AOB on behalf of an incarcerated client closely resembles the facts in *Borre* and *Nees* where actual suspension was appropriate, but unlike those cases, respondent did not abandon his incarcerated client outright. Indeed, respondent's inaction did not cause client harm on this record. Furthermore, the misconduct in *Borre* involved moral turpitude because the attorney lied under oath and fabricated a letter and the incarcerated client's guilt or innocence was at issue. The client's criminal appeal was dismissed as a result of the attorney's misconduct. Beyond abandoning an incarcerated client's habeas corpus petition, the attorney in *Nees* also showed indifference by failing to participate in the disciplinary proceedings and committed further ethical transgressions by not cooperating with the State Bar or returning the client's file and advanced fees that were unearned. Respondent's misconduct and aggravating factors are not as extensive as those in either of these cases.

Like the attorneys in *Harris* and *Layton*, respondent's failure to file the AOB spanned multiple years. Additionally, his neglect resulted in his court removal, as was the case in *Layton*. Although the attorneys in *Harris* and *Layton* practiced law for several years without prior misconduct, such mitigation was outweighed by lack of remorse and significant harm to clients. Although respondent's unethical conduct harmed the administration of justice, there is no evidence of client harm. In balance, we find that respondent's seventeen years of discipline-free practice, successful post-misconduct practice, good character and cooperation outweigh the aggravation in this case. Although some of the misconduct in *Respondent Y* is analogous to respondent's, it does not involve issues of competent performance. We find respondent's misconduct and aggravation to be more extensive than those found in *Respondent Y*. However, like *Van Sloten,* respondent's misconduct involves only a single client matter. Although respondent's performance issues also involve a failure to report court-imposed sanctions and uncharged misconduct not found in *Van Sloten*, respondent has seventeen years of discipline-free practice compared to only five and one-half in *Van Sloten*. Furthermore, respondent's facts include additional mitigation not present in *Van Sloten,* such as good character and cooperation.

Comparisons with the other cases, however, cannot overshadow the unique facets of the case before us. We are most concerned that this case arises in the area of appointed representation in a criminal automatic appeal, where so very much is at stake for the defendant and for the fair and effective administration of justice. That context would normally lead us to recommend actual suspension for the totality of the misconduct present here. On the other hand, our independent review of the record shows that at least respondent's initial actions arose out of an attempt to assist, not hinder, the effective administration of justice. Respondent's senior partner sought to increase the number of counsel available in his firm to represent capital defendants and, undoubtedly, respondent was eager to accommodate the partner as well as the goal. Further, the history of the support structure available to respondent in this case, particularly the succession of CAP attorneys available to respondent as resources and more centrally,

respondent's associate counsel, appears to have diffused, rather than focused, respondent's vision of his responsibilities to his client and the Supreme Court.

Although this matter involves an incarcerated client, this is not a classic case of client abandonment. Respondent acceded to his partner's request that he take on a death penalty appeal, which he had never before undertaken. It seems clear that respondent was in over his head, resulting in his failure to timely extricate himself or to obtain appropriate relief from the Supreme Court, but no moral turpitude was involved. Rather, because of respondent's ineptitude or lethargy, or both, he allowed the appeal to languish. The harm thus was to the administration of justice, not to his client. Additionally, respondent's misconduct appears to be limited to this one – albeit prolonged – matter as there is no other evidence of misconduct, either in the seventeen years prior to this incident or in the three and one-half years afterwards. His misconduct is also at odds with the strong testimony of his character witnesses.

Of course, none of these facts excuses respondent's failure to perform his professional responsibilities properly. However, they form a unique confluence of circumstances that demonstrate to us that the goals of imposing discipline, protection of the public, courts and legal profession and the maintenance of high professional standards are best served here by a stayed suspension, such as that imposed in *Van Sloten*.

III. RECOMMENDATION

We recommend that respondent, THOMAS L. RIORDAN, be suspended from the practice of law in the State of California for a period of six months; that execution of the six-month period of suspension be stayed; and that he be placed on probation for a period of one year on the following conditions:

1. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership

Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

2. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

   (a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

   (b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

   During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

3. Within 30 calendar days from the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss probation conditions. At the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must meet promptly with the probation deputy as directed and upon request.

4. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

5. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

6. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for six months will be satisfied, and the suspension will be terminated.

IV. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

V. COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable as provided in Business and Professions Code section 6140.7 and as a money judgment.

WATAI, J.

We concur:

EPSTEIN, J.

STOVITZ, J.*

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*Retired Presiding Judge of the State Bar Court and Judge Pro Tem of the State Bar Court appointed by the State Bar Board of Governors under rule 14 of the Rules of Procedure of the State Bar, sitting by designation of the Presiding Judge.

Case No. 02-O-11078

In the Matter of Thomas L. Riordan

Hearing Judge

Hon. Joann M. Remke

Counsel for the Parties

For State Bar of California:	Sherrie B. McLetchie Office of the Chief Trial Counsel The State Bar of California 180 Howard St. San Francisco, CA 94105
For Respondent:	Jerome Fishkin Fishkin & Slatter Llp 1111 Civic Dr Ste 215 Walnut Creek, CA 94596